Supreme Court, U.S.
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In The

Supreme Court of the United States

JONATHAN LAZORKO, ADMINISTRATOR
OF THE ESTATE OF PATRICIA NORLIE,
A/K/A PATRICIA NORLIE-LAZORKO,

Petitioner,

vs.

PENNSYLVANIA HOSPITAL, THE INSTITUTE
OF PENNSYLVANIA, DR. DAVID E. NICKLIN,
UNIVERSITY CITY FAMILY MEDICINE and
UNITED STATES HEALTHCARE SYSTEMS
OF PENNSYLVANIA, INC., T/A U.S. HEALTHCARE,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. MAY A PARTY BE GRANTED SUMMARY JUDGMENT WHEN IT HAS INTENTIONALLY CONCEALED AND DESTROYED ERISA EVIDENCE AS WELL AS THE CONCEALMENT OF A WITNESS, WILLIAM DONALDSON? *Byrnie vs. Town of Cromwell Bd. Of Educ.*, 243 F.3d 93 (2nd Cir. 2001).

2. MAY A STATE COURT IGNORE THE ERISA OPINION OF THE THIRD CIRCUIT WHICH FOUND THAT THE PETITIONER HAD A VALID CAUSE OF ACTION? *Lazorko vs. Pa. Hospital*, 237 F.3d 242 (3rd Cir. 2000), 121 S.Ct. 552, Cert. Den.; *Pryzbowski vs. U.S. Healthcare*, 245 F.3d 266 (3rd Cir. 2001); *DiFelice vs. Aetna U.S. Healthcare*, 346 F.3d 442 (3rd Cir. 2003).

3. WHEN A FEDERAL COURT AND A STATE COURT EXAMINE THE SAME COMPLAINT AND ARRIVE AT AN OPPOSITE DECISION, IS THIS OBVIOUSLY CONTRARY TO UNIFORM ADMINISTRATIVE SCHEME FOR ERISA? *Great-West Life and Annuity Ins. Co. vs. Knudson*, 122 S.Ct. 708 (S.Ct. 2002).

LIST OF PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the lower courts appear here.

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BASIS FOR SUPREME COURT JURISDICTION

The Pennsylvania Supreme Court entered its final Order on March 3, 2005. Appendix A-1. Petitioner, Jonathan Lazorko, seeks review of that judgment on a writ of certiorari.

This Court has jurisdiction under 28 U.S.C. Section 1257 to review a writ of certiorari the judgment of a state Supreme Court when reviewing a case under ERISA.

STATUTORY PROVISIONS INVOLVED IN THE CASE

ERISA 29 U.S. Section 1001 et seq.

STATEMENT OF THE CASE

This action was filed in the Philadelphia Court of Common Pleas under *Lazorko vs. Pa. Hospital, et al.*, July 1995 No. 204 by Writ of Summons Pro-Se.

The plaintiff retained present counsel who filed a Complaint. The defendant, U.S. Healthcare removed the action to the Eastern District of Pennsylvania under *Lazorko vs. Pa. Hospital, et al.*, U.S. District Court for the Eastern District of Pennsylvania No. 95-CV-6151. This

action thereafter was remanded to the Philadelphia Court of Common Pleas.

In the Philadelphia Court of Common Pleas the defendants filed Preliminary Objections and the plaintiff filed an Amended Complaint which was removed again to Eastern District of Pennsylvania under *Lazorko vs. Pa. Hospital, et al.*, No. 96-CV-4858.

The plaintiff filed a Third Amended Complaint, a Fourth Amended Complaint and a Corrected Fourth Amended Complaint.

There were extensive discovery Motions and the Petitioner's counsel is of the opinion that the defendants have not disclosed all its records related to Mrs. Lazorko, the decedent.

The defendants all filed Motion for Summary Judgment. A material fact issue clearly exists as to these hospital defendants. The Lower U.S. District Court on June 30, 1998 dismissed the plaintiff's direct claims against U.S. Healthcare but not the vicarious liability claims and remanded the case to the Philadelphia Court of Common Pleas.

U.S. Healthcare filed a Motion for Reconsideration and created a fact issue when it produced an affidavit from the plaintiff's employer stating that there was an ERISA plan even though destruction of the entire ERISA file had taken place. U.S. Healthcare did not request a stay of the thirty (30) day appeal period. The Motion for Reconsideration was denied and U.S. Healthcare filed an Appeal on August 10, 1988.

The plaintiff filed two (2) Appeals within thirty (30) days of the Court's Order of June 30, 1988. One is related

to the trial court's improper sanctions and the other Appeal concerns dismissal of direct claims against U.S. Healthcare.

In *Lazorko vs. Penna. Hospital, et al.*, 237 F.3d 242 (3rd Cir. 2000) the Court reversed the lower court on the direct claims issue:

> The decision in question here, the need to hospitalize Patricia Norlie-Lazorko, appears to be just such a mixed eligibility decision and to the extent that the mixed decision implicates the quality of care received by Norlie-Lazorko. [*Pegram vs. Hedrich*, 530 U.S. 211 (2000)] *does not foreclosure the direct claim against U.S. Healthcare.* 237 F.3d at 250 Col. 1.

And the Appellate Court restored the direct claims against U.S. Healthcare:

> Because Lazorko requests relief for the consequences of U.S. Healthcare's provision of inadequate services and not for the denial of benefits under his health care plan, Count I of his Complaint was improperly removed to Federal court. Consequently, we will vacate the District Court's dismissal of Lazorko's direct claims against U.S. Healthcare and remand Count I to the District Court for remand to the state court for further proceedings. 237 F.3d at 251 Col. 2.

In *Pryzbowski vs. U.S. Healthcare, Inc.*, 245 F.3d 266 (3rd Cir. 2001) the Court, commenting on the quality of care:

> Most recently in *Lazorko v. Pennsylvania Hospital*, 237 F.3d 242 (3rd Cir. 2000), we again applied the distinction between claims raising quality of care issues and claims raising quantity

> of benefits issues. Lazorko, alleged that financial disincentives imposed by the HMO discouraged medical providers from hospitalizing a mentally ill beneficiary who later committed suicide. We decided that this was a quality of care claim because 'the denial of [the beneficiary's] request for hospitalization occurred in the course of a treatment decision, not in the administration of the [plaintiff's and beneficiary's] plan generally.' Id. at 250. Thus, we held that the plaintiffs's claim was not completely preempted under Section 502(a), 245 F.3d at 272 Col. 2.

In *DiFelice vs. Aetna U.S. Healthcare*, 346 F.3d 442 (3rd Cir. 2003) the Third Circuit states:

> And an allegation that an HMO's financial disincentives discouraged medical providers from hospitalizing a mentally ill woman was a "quality of care" claim because it occurred in the course of a treatment decision, and was therefore not preempted. *Lazorko*, 237 F.3d at 250.

Although, the 3rd Circuit recognized direct claims against U.S. Healthcare, the HMO wrongfully contended on at least three (3) occasions that there were no direct claims.

The Philadelphia Court of Common Pleas allowed the defendants to file another set of Motions for Summary Judgment. Because plaintiff's first expert had disappeared (he was later located in Mexico) the plaintiff produced a new expert three (3) months before the trial date. At a June 10, 2002 hearing the trial judge erroneously ruled that the new expert was presented at the "11th hour" and dismissed the entire action as to all defendants on August 5, 2002 The plaintiff's filed a timely appeal.

During the course of this action the defendants have used many tactics to frustrate the plaintiff's discovery; records have been lost or destroyed, groundless objections and Court Orders ignored and concealment of a witness, William Donaldson

During Dr. Nicklin's deposition he admitted to the destruction of records when they were subject to discovery. Plaintiff's counsel prepared Interrogatories which identified the destroyed records and their reference during Dr. Nicklin's deposition. Of course, U.S. Healthcare objected to the request and refused to produce the records. Dr. Nicklin and the Hospital simply did not answer the request. So the lost records have not been revealed. In this case, Dr. Nicklin, Prudential and U.S. Healthcare all lost the *same* records during the pendency of this action and in this connection, the plaintiff brings to the Court's attention the case of *Byrnie vs. Town of Cromwell Bd. of Educ.*, 243 F.3d 93 (2nd Cir. 2001).

> We have defined spoliation as 'the destruction or significant alteration of evidence, or the failure to preserve property for another's use of evidence in pending or reasonably foreseeable litigation.' *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). The spoliation of evidence germane 'to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction.' *Kronish vs. United States*, 150 F.3d 112-126 (2d Cir 1998). This sanction serves a three-fold purpose of (1) deterring parties from destroying evidence; (2) placing the risk of an erroneous evaluation of the content of the destroyed evidence on the party responsible for its destruction; and (3) restoring the party harmed by the loss of evidence helpful to its case

> to where the party would have been in the absence of spoliation. *See West*, 167 F.3d at 779. In borderline cases, an inference of spoliation, in combination with 'some (not substantial) evidence' for the plaintiff's cause of action, can allow the plaintiff to survive summary judgment. *Kronish*, 150 F.3d at 128, 243 F.3d at 107.

Thus, the destruction of records, alone should have foreclosed the defendants' request for summary judgment.

REASON FOR GRANTING THE WRIT

1. Dis-Incentive Plan

Jonathan Lazorko and his wife, Patricia, were insureds of U.S. Healthcare through his employer, Prudential Insurance. Eventually, Mrs. Lazorko came under the care of David E. Nicklin, M.D. Under his care she was admitted to the hospital on several occasions. Following a June, 1993 occasion related to apparent suicide attempt, she was admitted again. However, the treatment was inadequate and she was wrongfully discharged contrary to the hospital determination that Mrs. Lazorko was suicidal. Tragically, thereafter within three (3) weeks of her hospital discharge she committed suicide on July 4, 1993. Mrs. Lazorko was the victim of U.S. Healthcare's plan to limit the treatment of patients wherein doctors, in this case Dr. Nicklin, were paid by U.S. Healthcare to limit treatment.

During discovery, Mr. Lazorko was deposed for a period of two (2) days in which he stated that U.S. Healthcare did not disclose to him the physicians incentive plan to limit treatment. Mr. Lazorko, under oath stated, if he had known that Dr. Nicklin was being paid to limit treat-

ment he would engage another physician to treat and care for his wife. U.S. Healthcare dis-incentive plan and Dr. Nicklin's failure to treat Mrs. Lazorko within that which, as a physician, he was sworn to do, caused Mrs. Lazorko's death. *Bixler vs. Central Penn.*, 12 F.3d 1292, 1300 (3rd Cir. 1993); *Shea vs. Esenten*, 107 F.3d 625, 629 (8th Cir. 1997); *Jordan vs. Federal Express Corp.*, 116 F.3d 1005 (3rd Cir. 1997). Moreover, U.S. Healthcare and Dr. Nicklin are liable under the Pennsylvania's Unfair Trade Practices and Consumer Protection Law; 73 P.S. Section 201-1 et seq.

2. Discovery Abuses Of U.S. Healthcare And Prudential And The Absence Of An Erisa Plan

On May 1, 1998, the plaintiff initiated service of a subpoena upon Prudential to produce all its records related to purchase of its U.S. Healthcare insurance policy and the record of the services provided under that policy as it related to Mr. and Mrs. Lazorko. The deposition related to the said subpoena was to take place on May 11, 1998. Nevertheless, notwithstanding proper notice, ninety (90) minutes before the time for the deposition, U.S. Healthcare by fax forwarded a letter which stated that counsel had just learned of the deposition. Such conduct was characteristic of all abuse of discovery that followed. Neither a Prudential attorney nor any defense counsel – appeared for the deposition.

Following a letter by plaintiff's counsel, a telephone call from a K.C. Jim Lee was received in which he advised that he was given the subpoena to process and someone would respond. Upon further delay, Mr. Lee eventually

disclosed that the subpoena was sent to Ms. Borak at the Prudential's Newark N.J. office.

Upon delay and a cavalier attitude, Ms. Borak advised that Prudential's U.S. Healthcare file was lost and for the record Ms. Borak faxed a letter confirming her communication. Ms. Borak did, however, advise that she believed U.S. Healthcare may have a copy of the contract. In this connection, at a hearing initiated by the plaintiff before District Court Judge Welsh, an affidavit of a Ms. Laurento was produced to disclose that U.S. Healthcare records have been lost or destroyed by Prudential.

Prudential having conveniently lost it file is subject, nevertheless to the adverse inference that the contents of the file would be adverse to its interest and such concealment serves the interest of the plaintiff. Here, the authority set forth in *Hansen vs. Continental Insurance Co.*, 940 F.2d 971 (5th Cir. 1991) is appropriate as follows:

> [2,3] Whether a particular set of insurance arrangements constitute an 'employee welfare benefit plan' is a question of fact. 940 F.2d at 976.
>
> [8] To determine whether an employee 'established or maintained' an employee benefit plan, 'the court should [focus] on the employer . . . and [its] involvement with the administration of the plan.' *Gahn*, 926 F.2d at 1452. Thus, if an employer does no more than purchase insurance for her employees, and has no further involvement with the collection of premiums, administration of the policy, or submission of claims, she has not established an ERISA plan. *Kidder*, 932 F.2d at 353; *Memorial Hospital*, 904 F.2d at 242.

Since U.S. Healthcare has no evidence of an ERISA plan, it called upon Prudential to obtain an affidavit from

a Prudential Associate Manager who nevertheless swore that there had been an ERISA plan. An affidavit simply does not produce an ERISA plan. The question then is . . . was Prudential's affidavit sufficient to establish an issue of fact under the circumstances? Here it is clear that U.S. Healthcare could not produce a Congressionally mandated ERISA plan; notwithstanding Prudential's representation that one had existed.

3. Hospital Network Liability

Dr. Nicklin's deposition testimony disclosed his obligation to admit Mrs. Lazorko to a Healthcare Network Hospital as follows:

> THE WITNESS: I don't know the contents of the discussion that she had with Sharon West, or the PA in the office, but U.S. Healthcare patients who became pregnant have the choice of delivering at any of the participating U.S. Healthcare hospitals and using any of the participating OB providers in the U.S. Healthcare network. Page 34, Lines 22 to 24, Page 25, Lines 1 to 6.

Significantly, the hospital records disclose:

> Recommend admission, Pt impulsive destructive toward (?) & property. Thoughts of termination 8 mo pregnancy. disorganized will recommend that HMO find in pt. Facility for pt.

In spite of discovery abuse as previously related, plaintiff's counsel obtained a subject U.S. Healthcare manual which disclosed the following:

> 1.2 Referrals . . . Physician shall refer or admit Members only to Participating Providers for Covered Services . . .

5. *Hospital Care*

a. At the time of application, physician must show that during the six months immediately prior to application he/she had hospital privileges to admit his/her patients own service unless such applicant has recently completed his residency program. This showing may be in the form of

(1) A letter from the Chief of Staff of the admitting hospital

(2) A letter from the Chief of Service of the admitting hospital.

b. Physician must have admitting privileges at a U.S. Healthcare participating hospital.

Hospital Claims Utilization:

If a member's total paid hospital utilization exceeds $20,000 for the dates of service being measured, all hospital paid utilization for that member will be removed from a primary office's financial statistics.

U.S. Healthcare's Physician and Hospital Directory exercised complete control as stated below:

Before joining our network, these doctors must pass a stringent certification process that substantiates they have appropriate credentials, licenses and hospital privileges; an acceptable record of service and experience; as well as accessible office hours and around-the-clock coverage.

Additionally, primary care physicians are reviewed by a peer committee that assess the care and service they provide. Finally, because our

> goal to improve quality is an enduring commitment, participating primary care physicians must undergo a thorough recertification process periodically. (Emphasis added)

In *Re Managed Care Litigation*, 185 F.Supp. 2d 1310 (S.D. Fla. 2002) Judge Moreno made the following observation of the intensive control exercised over the physicians:

> Each insurance company is poised at the apex of the network of its creation and facilitates the interaction between the members of the enterprise on a daily basis. Moreover, the Plaintiffs allege that each insurance company applies extortionate financial and contractual pressure on the physicians in order to maintain the silence essential to the success of the fraud. Id. at 1324.

The Court concluded:

> These factual allegations support the inference that the defendants have some part in directing the affairs of each National Enterprise. Id. at 1324.

U.S. Healthcare created a Network in which the Doctors are paid more for less treatment. The Doctors are under the control of U.S. Healthcare if they wish to accept the pay limitation.

4. Discovery Abuses Of The Defendants

On September 11, 1995, the plaintiff filed a request to produce documents under a Philadelphia Court of Common Pleas caption. The defendants ignored this discovery for virtually two (2) years. On May 9, 1997, the plaintiff filed the same request to produce documents under a

Federal caption which the defendants continued to ignore. On September 15 and 16, 1997, the plaintiff was deposed for two (2) days and the defendants nevertheless continue to ignore the plaintiff's discovery. On March 20, 1998 after a motion to compel discovery was filed and hearing was held, the defendant, U.S. Healthcare after several years of resistance to discovery U.S. Healthcare produced six (6) pieces of paper; it can be logically concluded that no discoverable documents existed. U.S. Healthcare is representing to the court that when it "approved" Mrs. Lazorko's admission or "reviewed" her case there were no reports or documentation of any kind. In fact, U.S. Healthcare failed to produce the names of the individuals who "approved" the admission or "reviewed' the case. Now U.S. Healthcare has only six (6) pages on Mrs. Lazorko's file. It may have records under a different classification and it will not produce the records except upon specific identification. The six (6) pages of records may be inadequate record keeping under ERISA regulations and this fact has been the subject of interest by the Department of Labor.

Outrageous abuse of discovery and misconduct continued with Requests for Admission submitted to U.S. Healthcare regarding documents prepared by U.S. Healthcare. Counsel claimed that the documents were not attached to the Requests and counsel therefore refused to respond. The Requests for Admission were sent a second time with the documents securely attached. To date there has not been a response. Even with the limited disclosure on March 20, 1998, the discovery has been one way and U.S. Healthcare continues to engage in concealment and to wrongfully resist discovery. Defendant, Dr. Nicklin, revealed during a deposition that he trashed all his records regarding U.S. Healthcare. While those records remained

in his possession, the plaintiff attempted discovery which the doctor simply ignored during the years of 1995 and 1997. Finally, the Court ordered U.S. Healthcare to respond to discovery. On March 20, 1998 a superficial response was provided. The plaintiff also sent specific Requests for Admission, interrogatories and Requests for documents on the following dates:

1. October 3, 1997
2. November 6, 1997
3. April 8, 1998
4. May 27, 1998

U.S. Healthcare ignored, those specific requests.

On September 11, 1995, Dr. Nicklin and University City Family Medicine were provided with discovery requests. On May 9, 1997, Dr. Nicklin and University City Family Medicine were sent the same discovery requests under a Federal caption. On October 6, 1997, Dr. Nicklin was sent a notice of deposition with a document request attached. On October 13, 1997, Dr. Nicklin was deposed. He revealed that he received capitation lists and routine communications from U.S. Healthcare. Dr. Nicklin also revealed that he discarded his U.S. Healthcare file. To date, U.S. Healthcare has not produced its file related to Dr. Nicklin. Dr. Nicklin testified that he was evaluated by U.S. Healthcare. U.S. Healthcare has not produced that evaluation.

Plaintiff's counsel obtained documents from independent sources which are: (1) U.S. Healthcare contract (2) a U.S. Healthcare News Release and (3) a U.S. Healthcare manual. A contract which U.S. Healthcare calls

"Primary Care Physical Agreement" shows that U.S. Healthcare has control over the doctor and the control is in the nature of "economic duress".

Interestingly, the First Page states:

> Physician also acknowledges that by signing this Agreement. Physician agrees to abide by the quality assessment, utilization Management and other applicable rules and regulations of the Licensed health maintenance organization ['HMO'] and other Health plans operated or administered by U.S. Healthcare. (RR 455)

U.S. Healthcare keeps a data bank on physicians' practices. This information has not been disclosed in discovery. U.S. Healthcare has a very detailed program designed to control the doctors and the data. U.S. Healthcare has in gross error refused to produce records related to the treatment of Mrs. Lazorko and U.S. Healthcare would have the court believe that Dr. Nicklin never advised U.S. Healthcare about Mrs. Lazorko's treatment. Plaintiff's counsel at page seventy-two (72) of the Nicklin deposition as of October 13, 1997 stated:

> It's my position the records I requested today, which he (Dr. Nicklin) did have access to until July of '97. . . . They should have been produced at the deposition or some time before. (Lines 9-17, RR 837-870)

Again, plaintiff's counsel stated at page seventy-two (72):

> . . . so he (Dr. Nicklin) had access to those records when the request to produce was sent out in September of '95 and again under the federal caption of May of '97, Lines 1-4

The shocking report of David L. Rhodes, Sr., MD. is illustrative of the deliberate and outrageous concealment that has taken place in order to wrongfully thwart the cause of the plaintiff. What was the specific conduct of defendant, David Nicklin, M.D. in discharging Mrs. Lazorko? It is the objective of the defense that we are never to satisfactorily know. Nevertheless, Dr. Rhodes describes, with certainty, the wrongful and tragic concealment as follows:

> Since Dr. Nicklin's June 11, 1993 personal handwritten note in Pennsylvania Hospital's records quite candidly documents that Mrs. Lazorko's 'major psych problems' were 'well-known' to him; that he knew she was 'very depressed' and 'wished to die,' and further acknowledged that her current suicide attempt by overdose was not to be taken lightly-representing 'quite significant risk of death', in his medical training should have provided him with the knowledge that such a chronic and severe condition could not miraculously change overnight and that his discharge of Mrs. Lazorko the very next day, June 12, 1993, was grossly inappropriate.

Dr. Rhodes continues in his December 3, 1997 report:

> As much as it displeases me, in light of Dr. Nicklin's hand-written note, I am ethically bound to conclude that his decision to discharge her in less than seventy-two hours when it was well known to him that she was chronically depressed and a suicide risk, must have been made by him because of either monetary restraints placed on his treatment regime by Pennsylvania Hospital and/or U.S. Healthcare/HMO PA-NJ and/or

> financial incentives offered to him for managing his practice in that manner.

In describing the obvious and defective nature of the defense, Dr. Rhodes concludes in convincing professionalism the following:

> In conclusion, it is my opinion, within a reasonable degree of medical certainty, that deviation from acceptable medical standards prevalent within the medical community by Pennsylvania Hospital and Dr. David E. Nicklin combined with U.S. Healthcare/HMO PA-NJ's budgetary restraints and/or financial incentives provided to Dr. Nicklin, proximately caused Mrs. Norlie-Lazorko's death at her own hands by inappropriately discharging her from the hospital when she clearly remained a danger to herself and resulted in her self-inflicted death shortly thereafter.

The actual deposition testimony of defendant, David E. Nicklin, M.D. is revealing with respect to spoliation of evidence and in confirmation of Dr. Rhodes' opinion. Specifically at page seventy-one (71) of the deposition transcript of Dr. Nicklin, the following resistance to discovery is asserted:

> MR. O'BRIEN: I will go into care and treatment, but I requested records some time ago. I have now learned that he is no longer in possession of those records and he was at the institute until July of '97, so he had access to those records when the request to produce was sent out in September of '95 and again under the federal caption May of '97. And I asked for documentation, and, also, a list of records in a request to produce for the deposition, as well.

> I will ask the medical questions but I think – no. It's my position the records that I requested today, which he did have access to until July of '97 should have been produced. I will accommodate regarding time so that we can ask questions regarding those records, but I do feel they should have been produced at the deposition or some time before. If you object to another day, we'll deal with that.
>
> Deposition Transcript of David E. Nicklin, M.D. dated October 13, 1997, Page 71, line 20 to Page 72, Line 18.

The foregoing was the result of the fact that Dr. Nicklin unashamedly revealed the trashing of the records about which Mr. O'Brien spoke. Not only Dr. Nicklin, but his counsel, bear responsibility for concealment and deliberate destruction of evidence. The specific deposition testimony by Dr. Nicklin is as follows:

> A. I continued to work at University City until three months ago; and so for three years after the practice sale, I continued to be the lead physician in that group. And the documents in terms of lists of capitation and capitated patients and so on, stayed with me. And I think that, actually at the time that I cleaned out my office and moved to the University of Pennsylvania in July, I, threw away a lot of that stuff.
>
> Q. That was in July of '97?
>
> A. Yes.
>
> Q. Was your contract included in that documentation?
>
> A. Possibly.

> Q. Were your evaluations, yearly evaluations, included in that documentation?
>
> A. Possibly.
>
> Deposition Transcript of David E. Nicklin, M.D., dated October 13, 1997, Page 54, Line 22 to Page 55, Line 14.

Actually, the intended insured, Jonathan Lazorko, was not aware that doctors associated with U.S. Healthcare engaged in incentives to deny treatment of patients. Dr. Nicklin during his deposition testimony concealed incentives for restrictive treatment. The deposition testimony in this respect clearly reveals that fact although there was considerable effort to conceal it. Ultimately, Dr. Nicklin was asked:

> Q. Do you receive additional payments, as well, for each patient?
>
> A. Yes.
>
> Q. Do you disclose that particular additional payment plan to Mr. and Mrs. Lazorko?
>
> A. No.
>
> Deposition Transcript of David E. Nicklin, M.D. dated October 13, 1997, Pages 106 and 107.

Judge Welsh's Order of June 11, 1998 directed to defendants stated:

> 5. On or about July 1, 1998 U.S.H.C. and all other defendants shall respond to the plaintiff's fifth set of Interrogatories and Request to Produce.

Both U.S. Healthcare and Dr. Nicklin offered objections and little information. Pa. Hospital and the Institute did not respond.

5. Concealment Of William Donaldson

The most outrageous act on the part of the defense is the attempt to hide a witness. In a public statement William Donaldson of Aetna-U.S. Healthcare admitted that Aetna had been sued in fifty (50) cases for putting profits over patients. Mr. Donaldson admitted that there were settlement negotiations in progress. In response to the plaintiff's motion to compel Mr. Donaldson's deposition, the defendant, U.S. Healthcare replied in falsehood:

> Mr. Donaldson is no longer employed by U.S. Healthcare and therefore U.S. Healthcare can not produce him in any event.

In a Motion for Reconsideration, U.S. Healthcare stated:

> Mr. Donaldson is not now (nor ever was) an officer or employee of U.S. Healthcare, U.S. Healthcare has no authority, control or ability to compel Mr. Donaldson to appear for the deposition; a party cannot be compelled to produce a witness it has no authority, control or ability to produce.

U.S. Healthcare also stated:

> Although Mr. Donaldson was chairman of Aetna, Inc. from February, 2000 to April 2001, he no longer even holds that position.

U.S. Healthcare was directed by Court Order of Judge Allen to give to the plaintiff Mr. Donaldson's last known

address. On January 22, 2002, U.S. Healthcare's counsel sent a letter to plaintiff's counsel which stated:

> Dear Mr. O'Brien:
>
> According to Aetna's records, Mr. William Donaldson's last known address is:
>
> Mr. William Donaldson
> c/o Credit Suisse First Boston
> 277 Park Avenue, 18th Floor
> New York, NY 10172
>
> Very truly yours,
>
> RAWLE & HENDERSON
> By: Carl D. Buchholz, III (RR 3265)

On June 3, 2002, Mr. Donaldson was independently located and a fax was sent to him requesting that he communicate with plaintiff's counsel.

On June 4, 2002, plaintiff's counsel received a letter from a Mr. Kenneth Kelly who disclosed that Mr. Donaldson is currently on the board of Aetna and that he would oppose a deposition. It is clear that counsel for U.S. Healthcare lied to the Court in an attempt to conceal Mr. Donaldson.

All of the foregoing is characteristic of defendants' unlawful conduct; none of which affected Judge Allen.

6. Failed Motions For Dismissal

U.S. Healthcare filed a motion for dismissal before the U.S. District Court and it was partially granted. Later the Third Circuit reversed that partial dismissal. *Lazorko vs. Pa. Hospital*, 237 F.3d 242 (3rd Cir. 2000). U.S. Healthcare should not have been permitted to file a second Motion for

Summary Judgment. The Pa. Hospital and the Institute filed two motions to dismiss, December 20, 1995 and July 22, 1996. They were similarly denied. Aside from the restrictive control exercised by U.S. Healthcare over their doctors. The Third Circuit dealt specifically with the nature of Mrs. Lazorko's claim as follows:

> We now conclude that Lazorko's claim, as it has been pled, falls on the standard of care, not the denial of benefits, side of the line.
>
> We note, moreover, that since our decision in *In re U.S. Healthcare*, our district courts have consistently applied its reasoning to determine whether it is the quality of care provided or the denial of a plan benefit that is implicated when treatment is refused. *See, e.g., Tiemann v. U.S. Healthcare*, 93 F.Supp.2d 585 (E.D. Pa. 2000) (classifying failure to diagnosis and treat disease properly as question of benefit quality not quantity); *Berger v. Livengrin Foundation*, 2000 WL 325957 (E.D. Pa. Mar. 27, 2000) (concluding that refusal to provide inpatient care was question of quality of treatment and not denial of benefit due under plan).
>
> [18] Because we conclude that Lazorko's case is not subject to complete preemption, it follows that it was improperly removed from state court. We must therefore vacate the dismissal by the District Court of the direct claims in Count I of the Fourth Amended Complaint and remand those claims to the District Court for remand to state court. When the underlying federal subject matter jurisdiction upon which to remove a case from state court does not exist, the entire case must be remanded. See 28 U.S.C. Section 1147(c). 237 F.3d at 250 Col. 2.

The defendants are responsible for Mrs. Lazorko's psychoses driven suicide and their conduct in avoidance is reprehensible.

However, when faced with all this evidence and the opinion of the Third Circuit, the state trial Court ignored the Federal Opinion, the State intermediate Court ignored the Federal Opinions and the State Supreme Court ignored the Federal Opinion without comment. The Court's silence is consent to the defendants' misconduct. *Chambers vs. Montgomery*, 192 A.2d 355 (Pa. 1963)

CONCLUSION

It is an error by the Court not to act when a party actively conceals evidence. Within such a setting, it is appropriate to call to the attention of the Court, the case of *E.I. Dupont De Nemours and Company-Benlate Litigation* identified as *The Bush Ranch, Inc. vs. E.I. Dupont Nemours and Company*, U.S. District Court, M.D. Georgia Columbus Division, August 21, 1995; 918 F.Supp. 1524 (N.D. GA 1995). In this case evidence established that the defendant committed fraud, discovery abuses and violation of court orders and as a result Court imposition of sanctions in the sum of $6.8 million dollars for discovery abuses were assessed and one hundred million dollars ($100,000,000) for civil contempt was imposed. The Georgia Court was relying upon the authority of Supreme Court of the United States in *Exparte Robinson* 19 Wall. 505, 86 U.S. 505, 22 L. Ed. 205 (1873). Further, the Supreme Court of the United States in *Toledo Newspaper Co. vs. United States*, 247 U.S. 402, 38 S.Ct. 560, 62 L.Ed. 1186 (1918) made perfectly clear as the Georgia District

Court stated that contempt is not restricted to inference with simple concepts of order and decorum. More importantly, it is the effect upon the administration of justice which is the test of whether misbehavior is contempt. The Georgia Court observed:

> The Court of Appeals of this circuit recently considered and addressed a situation where, like here, the defendant 'stubbornly withheld discoverable information. . . . ' *Malautea vs. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1529 (11th Cir. 1993). There, the District court specifically found four methods whereby the defendants have resisted discovery: first, the defendants played word games, saying that certain words and phrases were not defined: second, the defendants unilaterally limited the meaning or scope of discovery requests; third, the defendants failed to produce documents ordered to be produced and in so failing showed disdain for the Court's orders; and fourth, the defendants deliberately covered up damaging evidence. See id. at 1540-41. A review of the evidence reveals all the discovery avoidance methods in *Malautea*, 918 F.S. at 1542 Col. 1.

The Georgia Court not with any significant difference to similar rules of Pennsylvania discovery stated:

> Adversarial machinations surrounding the discovery process are often at odds with the stated purpose of the Federal Rules of securing the just, speedy and inexpensive determination of every action. But procedural manipulation designed to frustrate resolution of disputes on their merits has become a common strategy, 918 F. Supp. at 1542 Col. I.

Further, the Court continued:

> It is the obligation of counsel under the rules, as officers of the court, to cooperate with one another so that in the pursuit of truth the judicial system operates as intended, so that neither the Court nor the litigants are put to unnecessary trouble and expense in the pursuit of the truth; and disputes are resolved on their merits as promptly and economically as the circumstances of the case permits. A litigant should not be allowed to play games with the court by concealing, denying or giving an evasive answer to what he knows to be true. 918 F.Supp. At 1543 Col. 1.

Logically, the Georgia Court stated observations related to discover that are applicable in any jurisdiction, are as follows:

> In some types of litigation the motivation to resist discovery is so great that offenders will not comply with discovery unless they know in advances that the cost of 'stonewalling' will be greater than the benefits. Only by imposing harsh sanctions against a willfully deceitful and evasive litigant do the courts take the advantage out of such misbehavior and turn into a decided disadvantage. Only by doing so can the courts empower their officers to refuse involvement in such misconduct, and give them the power to persuade their clients that such is not in their best interests. There will be no point in paying lavish litigation fees and costs to a lawyer to suppress the truth if the swift and certain punishment will follow. The choice can and should be made simple and clear. Litigation in our courts honestly and by the rules, or suffer the consequences. The public expects and deserves no less if confidence in our judicial system is to

> be preserved, as it must be. *Hogue vs. Fruehauf Corp.*, 151 F.R.D. 635 (C. D. III 1993); *Baker vs. General Motors Corp.*, 159 F.R.D. 519 (W.1). No. 1994) 918 F.Supp. At 1543, Col. 2

The U.S. Healthcare manual disclosed that Dr. Nicklin was controlled by U.S. Healthcare's procedure or he would be discharged. Finally, some unnamed individuals at U.S. Healthcare "approved" and "reviewed" Mrs. Lazorko's treatment. This demonstrates U.S. Healthcare control over Dr. Nicklin and all of the physicians.

Herein, the trial judge without cause or reason and contrary to all of the defendants' misconduct, granted summary judgment in favor of all defendants. The Complaint containing cause of action for medical malpractice and corporate negligence is clear and expansive, all of which Judge Allen apparently failed to understand. Yet several times the Third Circuit has recognized the Petitioner's cause of action when Lazorko is cited in other opinions. The state courts ignored established Federal law.

In *Great-West Life and Annuity Ins. Co. vs. Knudson*, 122 S.Ct. 708 (2002) Justice Ginsburg stated:

> We have recognized that Congress sought through ERISA 'to establish a uniform administrative scheme' and to ensure that plan provisions would be enforced in federal court, free of 'the threat of conflicting or inconsistent State and local regulation.'

When a Federal Court and a State Court examine the same Complaint and arrive at different results there is failure of a consistent "uniform administrative scheme" for ERISA.

WHEREFORE, the Petitioner requests that this case be remanded to the Pennsylvania State Courts directing them to follow a "uniform administrative scheme" for ERISA as the U.S. Supreme Court recognizes the intent of the United States Congress.

Respectfully submitted,

JOHN J. O'BRIEN, JR., ESQUIRE
Attorney for Petitioner

APPENDICES

Page

Pa. Supreme Court Order of March 3, 2005 in which a Petition for Reconsideration was Denied.....App. 1

Pa. Supreme Court Order of January 11, 2005 in which Petition for Allowance of Appeal was Denied .....App. 2

Pa. Superior Court Order of June 18, 2004 in which a Petition for Reconsideration was Denied.....App. 3

Pa. Superior Court Opinion of April 13, 2004 in which the Court affirmed the trial court .....App. 4

Philadelphia Court of Common Pleas Opinion in which the plaintiff's action was dismissed.....App. 11

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

JONATHAN LAZORKO, ADMINISTRATOR OF THE ESTATE OF PATRICIA NORLIE A/K/A PATRICIA NORLIE LAZORKO, Petitioner v. PENNSYLVANIA HOSPITAL AND INSTITUTE OF PENNSYLVANIA, DAVID E. NICKLIN, M.D. & UNIVERSITY CITY FAMILY MEDICINE AND U.S. HEALTHCARE, T/A HMO-PA, Respondents	No. 328-332 EAL 2004 Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 3rd day of March, 2005, the Application for Reconsideration is denied.

TRUE COPY FROM RECORD

Attest: Mar. 03, 2005

/s/ Patricia Johnson
Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania,
Eastern District

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

JONATHAN LAZORKO, ADMINISTRATOR OF THE ESTATE OF PATRICIA NORLIE A/K/A PATRICIA NORLIE LAZORKO, Petitioner v. PENNSYLVANIA HOSPITAL AND INSTITUTE OF PENNSYLVANIA, DAVID E. NICKLIN, M.D. & UNIVERSITY CITY FAMILY MEDICINE AND U.S. HEALTHCARE, T/A HMO-PA, Respondents	No. 328-332 EAL 2004 Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 11th day of January, 2005, the Petitions for Allowance of Appeal are denied.

TRUE COPY FROM RECORD

Attest: Jan. 11, 2005

/s/ Patricia Johnson
Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania,
Eastern District

J. A31014/03

JONATHAN LAZORKO, ADMINISTRATOR OF THE ESTATE OF PATRICIA NORLIE a/k/a PATRICIA NORLIE LAZORKO,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
v.	:	
PENNSYLVANIA HOSPITAL AND INSTITUTE OF PENNSYLVANIA, DAVID E. NICKLIN, M.D. & UNIVERSITY CITY FAMILY MEDICINE AND U.S. HEALTHCARE, t/a HMO-PA,	:	
Appellees	:	No. 2821, 2822, 2823, 2824 & 2825 EDA 2002

ORDER

AND NOW, this 18th day of June, 2004, IT IS HEREBY ORDERED:

THAT the application filed April 26, 2004, requesting reargument/reconsideration of the decision dated April 13, 2004, is DENIED.

PER CURIAM.

JONATHAN LAZORKO, ADMINISTRATOR OF THE ESTATE OF PATRICIA NORLIE a/k/a PATRICIA NORLIE LAZORKO,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
v.	:	
PENNSYLVANIA HOSPITAL INSTITUTE OF PENNSYLVANIA, DAVID E. NICKLIN, M.D. & UNIVERSITY CITY FAMILY MEDICINE AND U.S. HEALTHCARE, t/a HMO-PA	:	
Appellees	:	NO. 2823 EDA 2002

Appeal from the Order dated August 5, 2002
In the Court of Common Pleas of Philadelphia County
Civil at No. 204 July Term, 1995

JONATHAN LAZORKO, ADMINISTRATOR OF THE ESTATE OF PATRICIA NORLIE a/k/a PATRICIA NORLIE LAZORKO,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
v.	:	
PENNSYLVANIA HOSPITAL AND INSTITUTE OF PENNSYLVANIA, DAVID E. NICKLIN, M.D. & UNIVERSITY CITY FAMILY MEDICINE AND U.S. HEALTHCARE, t/a HMO-PA	:	
Appellees	:	NO. 2824 EDA 2002

FILED APRIL 13, 2004

Appeal from the Order dated August 5, 2002
In the Court of Common Pleas of Philadelphia County
Civil at No. 204 July Term, 1995

NON-PRECEDENTIAL DECISION –
SEE SUPERIOR COURT I.O.P. 65.37

JONATHAN LAZORKO, ADMINISTRATOR OF THE ESTATE OF PATRICIA NORLIE a/k/a PATRICIA NORLIE LAZORKO, Appellants v. PENNSYLVANIA HOSPITAL AND INSTITUTE OF PENNSYLVANIA, DAVID E. NICKLIN, M.D. & UNIVERSITY CITY FAMILY MEDICINE AND U.S. HEALTHCARE, t/a HMO-PA Appellees	:	IN THE SUPERIOR COURT OF PENNSYLVANIA NO. 2821 EDA 2002

Appeal from the Order dated August 5, 2002
In the Court of Common Pleas of Philadelphia County
Civil at No. 204 July Term, 1995

JONATHAN LAZORKO, ADMINISTRATOR OF THE ESTATE OF PATRICIA NORLIE a/k/a PATRICIA NORLIE LAZORKO, Appellants v. PENNSYLVANIA HOSPITAL AND INSTITUTE OF PENNSYLVANIA, DAVID E. NICKLIN, M.D. & UNIVERSITY CITY FAMILY MEDICINE AND U.S. HEALTHCARE, t/a HMO-PA Appellees	:	IN THE SUPERIOR COURT OF PENNSYLVANIA NO. 2822 EDA 2002

FILED APRIL 13, 2004

Appeal from the Order dated August 5, 2002
In the Court of Common Pleas of Philadelphia County
Civil at No. 204 July Term, 1995

JONATHAN LAZORKO, ADMINISTRATOR OF THE ESTATE OF PATRICIA NORLIE a/k/a PATRICIA NORLIE LAZORKO, Appellants	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
PENNSYLVANIA HOSPITAL AND INSTITUTE OF PENNSYLVANIA, DAVID E. NICKLIN, M.D. & UNIVERSITY CITY FAMILY MEDICINE AND U.S. HEALTHCARE, t/a HMO-PA Appellees	:	NO. 2825 EDA 2002

Appeal from the Order dated August 5, 2002
In the Court of Common Pleas of Philadelphia County
Civil at No. 204 July Term, 1995

BEFORE: STEVENS, BOWES, and MONTEMURO*, JJ.

MEMORANDUM: **FILED APRIL 13, 2004**

Appellant Jonathan Lazorko, administrator of the estate of Patricia Norlie-Lazorko, appeals an order of the court of Common Pleas of Philadelphia County granting summary judgment in favor of Appellees, Pennsylvania Hospital, The Institute of Pennsylvania (the Institute), Dr. David E. Nicklin, University City Family Medicine, and United States Healthcare Systems of Pennsylvania (U.S. Healthcare). We affirm.

The circumstances preceding this unfortunate case can be briefly stated. Appellant's wife, Patricia Norlie, Lazorko, had a history of psychiatric problems Pa.R.A.P. 1925(a) opinion filed 4/29.03 at 2. She was admitted to the

* Retired Justice Assigned to the Superior Court.

Pennsylvania Hospital on June 10, 1993, after ingesting more than sixty (60) Tylenol tablets, but was released two days later with a diagnosis of depression and schizophrenia. ***Id.*** Twenty-two days after being discharged from the hospital, Mrs. Norlie-Lazorko committed suicide. ***Id.***

Represented by O'Brien & O'Brien, LLP, Appellant instituted a wrongful death action against Appellees in 1995. Appellees filed motions for summary judgment in February 2002, and a hearing was held on June 10, 2002. By his own admission, Appellant's original expert had "disappeared" by the time the hearing on the motions for summary judgment was convened, so Appellant sought to use the report of a new expert, Dr. Bursztajn, to show that Dr. Nicklin's treatment of Mrs. Norlie-Lazorko deviated from accepted medical standards. Appellant's brief at 13. The trial court refused to allow Appellant to use Dr. Bursztajn's report, based on its determination that the report was not timely provided to Appellees, and was insufficient in that it was "preliminary" in nature and rendered with Dr. Bursztajn's expectation that he would review and analyze additional discovery materials "[p]rior to formulating a final opinion." rule 1925(a) Opinion at 5. As such, the trial court found that Dr. Bursztajn would be unable to provide the required testimony that to a reasonable degree of medical certainty the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered. ***Id.***

Appellees' motions for summary judgment were granted on August 5, 2002. Lower Court order dated 8/5/02, filed 8/7/02. Appellant filed the instant appeal on August 12, 2002, and was ordered by the lower court to file a statement of matters complained of on appeal pursuant

to Pa.R.A.P. 1925(b). Appellant filed a twelve page Rule 1925(b) statement on August 30, 2002, followed by a supplemental Rule 1925(b) statement on September 6, 2002, and the lower court responded with a Rule 1925(a) opinion.[1]

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[1] We find it necessary to note that neither of Appellant's 1925(b) statements provides a clear indication of the issues he attempts to raise on appeal. Such vagueness risks waiver under ***Commonwealth v. Lord***, 719 A.2d 306 (Pa. Super. 1998). ***Commonwealth v. Thompson***, 778 A.2d 1215, 1223-1224 (Pa. Super. 2001).

In addition, the configuration of the brief submitted to this Court by Appellant violates Pa.R.A.P. 2111(a), 2116(a), 2117(b) and 2119(a), and hampers our ability to address the nine "issues" he purports to raise on appeal, which are contained in a two page "statement of issues for review," in violation of P.a.R.A.P. 2116(a), as follows:

> A. As a matter of law does the trial judge fail to understand medical malpractice?
>
> B. Does the trial judge have any understanding of corporate negligence?
>
> C. Did the Defendant's engage in monetary induced conspiracy to deny adequate medical [sic] for Patricia Norlie-Lazorko?
>
> D. Was it proper for the trial judge to deny proof by Plaintiff's expert?
>
> E. Aside from the exceptional expert report by Harold J. Burstajn [sic], M.D.; is there an abundance of evidence which establishes outrageously cruel and negligent conduct on the part of David E. Nicklin, M.D. and Pennsylvania Hospital, the Institute of Pennsylvania and U.S. Healthcare?
>
> F. Is there any doubt that the intentional lack of medical care caused the death of Patricia Norlie-Lazorko?
>
> G. Does the recitation of facts as set forth in the trial judge [sic] opinion raise a serious question with respect to the trial judge's competence in reviewing the facts of the case? Factually she ignores spoliation of medical records specifically related to Patricia Norlie-Lazorko.

(Continued on following page)

In its Rule 1925(a) opinion, the trial court provides an accurate procedural and factual history of the case, before discussing the applicable standard for granting summary judgment. Rule 1925(a) Opinion at 1-3. We need not expand on that information, nor do we find it necessary to

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> H. Does the reference to law as contained in the trial judge's opinion raise a serious question with respect to the trial judge's competence in reviewing the law of the case? Legally a party who destroys records (Dr. Nicklin) is subject to an adverse presumption that records destroyed could harm him.
>
> I. May a party be granted summary judgment when it has intentionally concealed and destroyed evidence?

Appellant's brief at 6-7. A number of these claims amount to nothing more than inappropriate personal insults aimed at the trial judge. They follow similar abusive claims made in Appellant's initial Rule 1925(b) statement, which accuses the trial court judge of having a "mind and temperament that is devoid of a rational capacity to think and a cynical view of law and reason." Rule 1925(b) statement at 8. This type of disrespect has no place before the court, and we strongly reprimand counsel for veiling such improper commentary as argument.

Following recitation of the above issues, Appellant inserts a two page "Introduction" and a "Statement of the Case," which contain argument in violation of Pa.R.A.P. 2117(b). ***Id.*** at 8-13. The brief next contains twenty-four pages which are captioned "Statement of the Facts." ***Id.*** at 14-37. Although the brief is fifty-four (54) pages long, Appellant presents a less than three page "Argument," subdivided into the headings "Voidable Contract," "Missing File," and "Spoilation & Lost Records," which violates Rule 2119(a), in that it does not correspond to the "Statement of the Questions Involved." ***Id.*** at 39-41. Finally, the argument is followed by a thirteen page "Conclusion" which fails to state the precise relief sought, as is required by Rule 2111(8). We remind counsel that pursuant to Pa.R.A.P. 2101, substantial defects in an appellate brief can result in quashal or dismissal of an appeal.

We decline to take action under ***Lord*** or Rule 2101, however, in light of our ability to conclude that Appellant has failed to show that the trial court committed an error of law or abused its discretion in granting summary judgment. ***Capek v. DeVito***, 564 Pa. 267, 270 n. 1, 767 A.2d 1047, 1048 n. 1 (2001).

add anything to the trial court's explanation of Appellant's burden in proving medical malpractice or corporate negligence, and its reasons for granting summary judgment on those claims. ***Id.*** at 3-6. The trial court has aptly supported its decision, and case law makes it clear that we may overturn a trial court's entry of summary judgment only if there has been an error of law or a clear abuse of discretion. ***Capek***, ***supra***. Since we find that Appellant has shown neither, we affirm the trial court's orders on the basis of its 1925(a) opinion.

Affirmed.

Judgment Entered.

/s/ [Illegible]
Prothonotary

Date: Apr. 13, 2004

PHILADELPHIA COURT OF COMMON PLEAS
CIVIL TRIAL DIVISION

JONATHAN LAZORKO, Administrator Of The Estate Of PATRICIA NORLIE a/k/a PATRICIA NORLIE LAZORKO, Plaintiff	:	
v.	:	
PENNSYLVANIA HOSPITAL, THE INSTITUTE OF PENNSYLVANIA, DAVID E. NICKLIN, UNIVERSITY CITY FAMILY MEDICINE US HEALTHCARE SYSTEMS OF PENNSYLVANIA, INC., Defendants	:	JULY TERM 1995 No. 0204
SUPERIOR COURT		**2821-2825 EDA 2002**

MEMORANDUM OPINION PURSUANT TO Pa.R.A.P. 1925(b)

PROCEDURAL HISTORY

On August 5, 2002 the court granted five (5) Summary Judgment Motions, I-V, in favor of defendants Pennsylvania Hospital, the Institute of Pennsylvania Hospital (collectively "Pennsylvania Hospital"), David E. Nicklin, M.D. ("Nicklin"), University City Family Medicine, and U.S. Healthcare, Motion I, filed by Pennsylvania Hospital, struck Counts: II Intentional Misrepresentation, III Fraud, IV (incorrectly designated as Count III) Statutory Violations, and V Jurisdiction (incorrectly designated as Count IV) of plaintiff's complaint. The only remaining cause of action is Count I Trespass. Motions II-V, filed by

the defendants, were granted subsequently. Plaintiff filed a timely appeal of the Orders.

A Statement of Matters Complained of on Appeal was filed on August 30, 2002 followed by a Supplemental Statement of Matters Complained of on Appeal filed on September 6, 2002. Plaintiff confined his Statements to claims of corporate negligence and medical malpractice. Accordingly, the issue on appeal is whether the court erred in granting summary judgment when plaintiff failed to establish evidence to satisfy the requirements of corporate negligence and medical malpractice.

FACTS

On July 3, 1995, Jonathan Lazorko, husband of Patricia Norlie-Lazorko and administrator of her estate, initiated this action against the defendants claiming, among other things, that defendants' failed to properly diagnose and treat decedent's mental illness. Patricia Norlie-Lazorko ("Norlie-Lazorko"), a 33-year-old woman with a history of psychiatric problems was admitted into Pennsylvania Hospital on June 10, 1993 after ingesting more than sixty (60) Tylenol tablets. Norlie-Lazorko was discharged two-days later with a diagnosis of depression and schizophrenia. On July 4, 1993, twenty-two (22) days after discharge, Norlie-Lazorko was found hanging inside her home.

DISCUSSION

I. Summary Judgment

Pennsylvania Rules of Civil Procedure 1035.2 provides:

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
>
> > (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
> >
> > (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

The non-moving party bears the burden of proof and may not merely rely on his pleadings or answers. *Young v. PennDOT*, 744 A.2d 1276, 1277 (2000). ("Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which it bears the burden of proof . . . establishes the entitlement of the moving party to judgment as a matter of law."). The court must review the record in the light favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Downing v. Crozer-Chester Medical Center*, 2003 WL 257271 (Pa. Super.), *citing*, *Murphy v. Duquesne University of the Holy Ghost*, 777 A.2d 418, 429 (Pa. 2001). An adverse party may supplement the record or set forth the reasons why the party cannot present evidence essential to justify opposition to the motion and any action proposed to

be taken by the party to present such evidence. *Gerrow v. John Royal & Sons*, 813 A.2d 778, 781 (2002) (The intent of Pa.R.C.P. 1035.2 "is not to eliminate meritorious claims that could be established by additional discovery or expert report".

Lazorko argues that summary judgment was improperly granted stating that "[t]he Complaint containing causes of action for medical malpractice and corporate negligence is clear and expansive; all of which the trial judge has apparently failed to understand." However, it is the court's position that the plaintiff has failed to articulate genuine issues of material facts.

A. Corporate Negligence

Plaintiff, in his Statement, asserts that his complaint includes a cause of action for corporate negligence as to Pennsylvania Hospital and U.S. Healthcare.

Corporate negligence is "a doctrine under which the *hospital* is liable if it fails to uphold the proper standard of care owed to patient, which is to ensure the patient's safety and well-being *while at the hospital.* This theory of liability creates a nondelegable duty which the *hospital* owes directly to a patient.." *Voorhees v. University of Pennsylvania*, 33 Phila. Co. Rprt. 302, 314. (1997), *quoting, Thompson v. Nason Hospital*, 527 Pa. 330, 591 A.2d. 703 (1991) (emphasis added).

Plaintiff must prove that the hospital breached: "(1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment . . . ; (2) a duty to select and retain only competent physicians . . . ; (3) a duty to oversee all persons who practice medicine within its walls

as to patient care . . . ; and (4) a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients." *Id.* Plaintiff must also prove that the hospital's operations were substandard.

First, U.S. Healthcare is not a hospital and, therefore, cannot be held liable under the corporate negligence doctrine as provided by the plaintiff. Plaintiff's complaint attempts to reach U.S. Healthcare under the corporate negligence doctrine by claiming an agency relationship existed among co-defendants. However, plaintiff failed to provide evidence of such a relationship. *Young*, 744 A.2d at 1277 ("Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which it bears the burden of proof . . . establishes the entitlement of the moving party to judgment as a matter of law.").

Second, Lazorko failed to assert a breach of the above duties. The complaint does not allege that the facility was unsafe, the physicians were incompetent, the medical personnel was practicing medicine without supervision or that the facility failed to formulate and enforce adequate rules and policies. The complaint alleges that the medical records did not contain a Utilization Review stickers, not that staff was not supervised.

B. Medical Malpractice

To establish a claim for medical malpractice, Pennsylvania requires a plaintiff to establish that the physician owed a duty to the plaintiff, that this duty was breached, the breach of the duty was the proximate cause of, or substantial factor in, bringing about the harm suffered by the patient, and the damages suffered by the patient were

a direct result of that harm. An expert witness is required to testify to a reasonable degree of medical certainty that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered. *Wolloch v. Aiken*, 756 A.2d 5 (2000).

Appellant presented Dr. Bursztajn's untimely expert report as evidence of Dr. Nicklin's deviation from accepted standards. In fact, the report was not presented to the court or to opposing counsel until the June 10, 2002 hearing on defendants' summary judgment motions.

Beside the untimeliness, the report was insufficient. Dr. Bursztajn qualified the expert report he submitted as "preliminary" and concluded his expert report by stating: "Prior to formulating a final opinion, I expect to review and analyze such additional discovery material which may become available including material relevant to the opinions above."

This statement leads the court to conclude that the expert witness did not meet the requirement "to testify to a reasonable degree of medical certainty that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered." *Wolloch*, 756 A.2d at 6

C. Appellant's Claims against Pennsylvania Hospital and the Institute of Pennsylvania Hospital

Per the August 5, 2002 order, all of plaintiff's claims and cross claims against Pennsylvania Hospital were

dismissed with prejudice, and the motions for summary judgment in favor of defendants were granted.

On appeal, plaintiff does not plead with specificity any claims or allegations in his attack of the trial court's Order. "It is not the function of this court to consider, and respond to, vacuous claims. When issues are not properly raised and developed in briefs, when the briefs are wholly inadequate to present specific issues for review, a court will not consider the merits thereof." *Commonwealth v. Fetter*, 770 A.2d 762, (Pa. Super 2001); *Commonwealth v. Delligatti*, 538 A.2d 34, 41 (Pa. Super 1988) *citing Commonwealth v. Sanford*, 445 A.2d 149, 159 (Pa. Super. 1982). Because plaintiff failed to defend his position refuting the above order granting summary judgment in the Statement of Matters on Appeal or its Supplement, the court cannot consider what is not put before it.

CONCLUSION

For the foregoing reason this Court's ruling of July 19, 2002 should be affirmed.

BY THE COURT

/s/ Allen J.
ALLEN, J.

4/28/03
DATE

Supreme Court, U.S.
FILED
JUL 1 - 2005
OFFICE OF THE CLERK

No. 04-1601

In The
Supreme Court of the United States

JONATHAN LAZORKO, Administrator of the Estate of Patricia Norlie, aka Patricia Norlie-Lazorko,

Petitioner,

v.

PENNSYLVANIA HOSPITAL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Superior Court Of Pennsylvania, Philadelphia Office

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE CASE

Respondent, David Nicklin, M.D., a family practitioner associated with respondent, University City Family Medicine, treated the decedent, Patricia Norlie-Lazorko, from September 22, 1988 until her death by suicide in 1993. The decedent had a long history of psychiatric problems. Throughout the years, she was referred to psychiatric facilities by Dr. Nicklin. On June 10, 1993, she contacted Dr. Nicklin's office and informed his staff that she had swallowed 60 Extra-Strength Tylenol. (R.2715) She was told to go to Pennsylvania Hospital's Emergency Department where she arrived ambulatory. (R.2715)

While in the Emergency Department at Pennsylvania Hospital, the decedent denied suicidal ideation and was assessed as not being in acute medical danger. In fact, her Tylenol level was zero. Because her liver function studies showed some abnormalities, she was admitted to the hospital for observation. (R.2716-2718) Dr. Nicklin evaluated the decedent in the hospital on June 11, 1993. The decedent told him that she sought medical help after taking an overdose of Tylenol because she thought about her infant daughter and decided she wanted to live. (R.3198-3199) The decedent advised the hospital's nurses that she didn't want to die and questioned the nurses about the effects of ingesting the Tylenol, expressing concern about her slow improvement. (R.2721-2722) Dr. Nicklin requested a psychiatric consultation. (R.3199)

A psychiatric consult, which included a suicide assessment, was conducted on June 11, 1993 by a psychiatrist at Pennsylvania Hospital. (R.3201) The decedent denied current suicidal ideation. It was determined by the psychiatrist that the decedent was free of suicidal ideation

and was an appropriate candidate for out-patient treatment. (R.3201)

On June 12, 1993, the decedent was seen by Carla Jardim, M.D., an internist associated with University City Family Medicine. Dr. Jardim found the decedent to be ready for discharge from a medical standpoint. (R.3200) The decedent was discharged on June 12, 1993 with instructions to follow-up with the Counseling Program and Dr. Nicklin. (R.2724-2725)

The decedent did not attend outpatient counseling. (SRR.2425) She did not contact Dr. Nicklin or University City Family Medicine. Approximately three weeks after her discharge, on July 4, 1993, the decedent was found dead at her home, having hanged herself. (R.2726) Cocaine, ethanol and narcotics were present on toxicological analysis. (R.2727)

Petitioner filed suit alleging that the respondents prematurely discharged the decedent and that the decision to discharge the decedent was motivated by financial incentives provided by the decedent's health maintenance organization. (R.1592) After a long and complicated procedural history, on January 16, 2002, the trial judge held a pretrial conference. The judge inquired as to the status of expert reports. Counsel for all parties represented to the Court that the expert reports had been exchanged. A trial date of September 9, 2002 was assigned and the parties were given 30 days to file dispositive motions. All respondents subsequently filed Motions for Summary Judgment. Petitioner filed numerous responses and supplemental responses to respondents' Motions for Summary Judgment.

On April 26, 2002, the trial judge heard oral argument on the Motions for Summary Judgment. At the conclusion of the argument, the parties were given an additional seven days to file any supplemental briefs. Petitioner filed a supplemental brief. Following oral argument, it was discovered that the court reporting machine had not been operating properly and the argument had not been preserved. For purposes of preserving the argument for appeal, a second "repeat" hearing was scheduled to take place on June 11, 2002.

On June 7, 2002, petitioner, for the first time, identified Harold J. Bursztjan, M.D., a psychiatrist, as his new expert and produced an unsigned preliminary report authored by Dr. Bursztjan. (SRR.23) At the repeat hearing, the trial judge inquired as to why petitioner's counsel did not previously advise her or defense counsel that he intended to identify a new expert. Counsel for petitioner replied that his original expert, Dr. Rhodes, was no longer available and that Dr. Bursztjan was a "substitute" expert for Dr. Rhodes. (R.3328-3329)

The respondents objected to the late production of Dr. Bursztjan's report on the ground that it was untimely disclosed, was unsigned, was submitted in bad faith and was prejudicial to the respondents who relied on the previously identified experts of petitioner in preparing their Motions for Summary Judgment. On August 5, 2002, the Motions for Summary Judgment were granted. Petitioner appealed. The trial court's ruling was affirmed by the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania.

SUMMARY OF ARGUMENT

The trial court did not err in granting the Motion for Summary Judgment of David Nicklin, M.D. and University City Family Medicine. The trial court properly found that petitioner had failed to create a genuine issue of material fact with respect to the alleged negligence of respondents. There was no competent evidence in this case to support petitioner's allegation that Dr. Nicklin and/or University City Family Medicine engaged in grossly negligent or willful misconduct in their care and treatment of the decedent as petitioner was required to prove under the Pennsylvania Mental Health Procedures Act. Further, petitioner failed to articulate genuine issues of material fact with respect to the issue of whether Dr. Nicklin and University City Family Medicine's care and treatment of the decedent was influenced by financial incentives allegedly provided by her health maintenance organization. Even if this Court were to find that the reports of petitioner's experts, Dr. Rhodes and Dr. Bursztjan, were sufficient to create genuine issues of material fact with respect to the alleged negligence of Dr. Nicklin and University City Family Medicine, these respondents would still be entitled to prevail on their Motion for Summary Judgment since petitioner's experts were not qualified to express an opinion on the issue of Dr. Nicklin's alleged negligence.

Finally, throughout the course of this litigation, petitioner has repeatedly accused Dr. Nicklin and University City Family Medicine of destroying documents relevant to petitioner's claims during the pendency of this litigation. There is no competent evidence to support petitioner's claims of spoliation of evidence as to Dr.

Nicklin. Even if there was, petitioner cannot prove that he was harmed by the alleged spoliation of evidence.

ARGUMENT

I. Whether Petitioner failed to articulate genuine issues of material fact with respect to the alleged negligence of David E. Nicklin, M.D. and University City Family Medicine.

A. Petitioner failed to articulate genuine issues of material fact with respect to the issue of whether Dr. Nicklin and University City Family Medicine were grossly negligent or engaged in willful misconduct with respect to their care and treatment of the decedent.

Under Pennsylvania law, to establish a case of professional negligence, the plaintiff is required to show that the professional conduct of the defendant fell below the standards of reasonable medical practice and that plaintiff's injuries were caused by the failure to adhere to such standards. *Brannan v. Lankenau Hosp.*, 490 Pa. 588, 595, 417 A.2d 196, 199 (1980). As a general rule, expert testimony is required to establish the standard of reasonable care. *Brannan*, 417 A.2d at 199-200. If at the conclusion of discovery, plaintiff fails to produce an expert medical opinion which addresses the elements of his cause of action within a reasonable degree of medical certainty, he fails to establish a *prima facie* case and may not proceed to trial.

The Pennsylvania Mental Health Procedures Act ("MHPA"), 50 Pa. Stat. Ann. §7101 *et seq.* establishes

rights and procedures for the treatment of mentally ill persons. 50 Pa. Stat. Ann. §7103. The Act grants limited immunity to certain persons and entities who provide treatment for mentally ill persons. Section 7114(a) of the Act provides:

> (a) In the absence of willful misconduct or gross negligence, a county administrator, a director of a facility, a physician, a peace officer or any other authorized person who participates in a decision that a person be examined or treated under this act, or that a person be discharged, or placed under partial hospitalization, outpatient care or leave of absence, or that the restraint upon such person be otherwise reduced, or a county administrator or other authorized person who denies an application for voluntary treatment or for involuntary emergency examination and treatment, shall not be civilly or criminally liable for such decision or for any of its consequences. (*See* 50 Pa. Stat. Ann. §7114(a).)

The Pennsylvania state Supreme Court has determined that the immunity provided by the MHPA extends to institutions, as well as natural persons, that provide care to mentally ill patients. *Farago v. Sacred Heart General Hosp.*, 522 PA. 410, 562 A.2d 300, 303 (Pa. 1989). Respondents fall within the class of persons and entities protected by the MHPA. Dr. Nicklin is a physician who participated in a decision that a person, i.e., the decedent, be examined or treated under the Act. As a family practice clinic which provides medical care to psychiatric patients, University City Family Medicine is most certainly an entity to which the provisions of the MPHA applies. Indeed, during the two oral argument sessions in the lower court on respondents' Motions for Summary Judgment, petitioner did not raise an objection to the application of the

MHPA. Thus, in order to recover, petitioner was required to establish that Dr. Nicklin and University City Family Medicine engaged in willful misconduct or were grossly negligent and that such conduct proximately caused the decedent's death by suicide.

The MHPA itself does not provide a definition of the phrase "gross negligence." In *Bloom v. DuBois Regional Medical Center*, 409 Pa. Super. 83, 597 A.2d 671 (1991), the Superior Court arrived at a definition of gross negligence for purposes of the Act. It said:

> . . . We hold that the legislature intended the term gross negligence to mean a form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity, or indifference. The behavior of the defendant must be flagrant, grossly deviating from the ordinary standard of care. *Bloom*, 597 A.2d at 679.

In *Albright v. Abington Memorial Hospital*, 696 A.2d 1159 (Pa. 1997), the Pennsylvania Supreme Court adopted this definition of gross negligence. *Id.*, at 1164.

Although the issue of whether a given set of facts satisfies the definition of gross negligence is a question of fact to be determined by a jury, a court may take the issue from a jury if the conduct in question falls short of gross negligence, the case is entirely free from doubt, and no reasonable jury could find gross negligence. *See*, e.g., *Willett v. Evergreen Homes, Inc.*, 407 Pa. Super. 141, 595 A.2d 164 (1991), alloc. denied, 529 Pa. 623, 600 A.2d 539 (1991).

In *Albright v. Abington Memorial Hospital*, the administrator of the estate of a mental patient, who had been placed on a 90-day regime of outpatient care and who

had died of injuries caused by a fire she had started, brought an action against the hospital which treated the decedent. Plaintiff alleged that the hospital failed to provide the decedent with proper treatment, ignored warnings of her deteriorating mental condition, and failed to have the decedent committed as an inpatient. Specifically, plaintiff alleged that the hospital did nothing to follow-up on the decedent's failure to attend all of her court-ordered mental health care appointments, even though the hospital knew that the decedent was not taking her medication, had a breakdown, was becoming manic and walking around at night, had left a dinner burn in the oven, and was chain smoking. The hospital had also been advised that there were cigarette burns on the couch, although it did not know when the burns were made.

The court found that although the hospital failed to promptly address the decedent's missed appointment, when the missed appointment was brought to the attention of the hospital, its staff sought to reschedule the appointment within a week. Further, the hospital was never informed that the decedent was violent or dangerous to herself or others. The court further found that the hospital believed that there was insufficient time to attempt an involuntary inpatient commitment, that a petition for an emergency commitment was insupportable and that there was insufficient evidence to establish that the decedent was a clear and present danger to herself or others. The *Albright* court found that far from ignoring the decedent, the hospital solicited information concerning her condition and exercised its judgment as to what course of action was appropriate at that time. Based upon the information in the possession of the hospital, which was devoid of any evidence that the decedent presented a clear

and present danger to herself or others due to her mental condition or smoking habits, and in light of the applicable statutory requirements, the court found that the conduct of and the judgment exercised by the hospital did not rise to the level of gross negligence. The Pennsylvania Supreme Court affirmed.

As in *Albright, supra*, the trial court properly found that petitioner failed to meet his burden of proving that respondents engaged in willful misconduct or acted in a grossly negligent manner in the treatment of the decedent. The evidence, which was not contradicted, shows that on June 10, 1993, the decedent contacted Dr. Nicklin's office and informed his staff that she had swallowed 60 Tylenol and that she was told to go to Pennsylvania Hospital. (R.2715) While in the Emergency Department she denied suicidal ideation and was assessed as not being in acute medical danger. In fact, her Tylenol level was zero. Because her liver function studies showed some abnormalities, she was admitted to the hospital for observation. (R.2716-2718) Dr. Nicklin evaluated the decedent in the hospital on June 11, 1993. The decedent told him that she sought medical help because she thought about her infant daughter and decided she wanted to live. (R.3198-3199) The decedent advised the hospital's nurses that she didn't want to die and questioned the nurses about the effects of the overdose, expressing concern about her slow improvement. (R.2721-2722) Dr. Nicklin requested a psychiatric consultation. (R.3199)

A psychiatric consult, which included a suicide assessment, was conducted on June 11, 1993 by a psychiatrist. (R.3201) The decedent denied current suicidal ideation. It was determined by the psychiatrist that the

decedent was free of suicidal ideation and was an appropriate candidate for outpatient treatment. (R.3201)

On June 12, 1993, the decedent was seen by Carla Jardim, M.D., an internist associated with University City Family Medicine. Dr. Jardim found the decedent to be ready for discharge from a medical standpoint. (R.3200) The decedent was discharged on June 12, 1993 with instructions to follow-up with the Counseling Program and Dr. Nicklin. (R.2724-2725)

The decedent did not attend outpatient counseling. (SRR.24-25) She did not contact Dr. Nicklin or University City Family Medicine. Approximately three weeks after her discharge, on July 4, 1993, she was found dead at her home, having hanged herself. (R.2726) Cocaine, ethanol and narcotics were present on toxicological analysis. (R.2727)

Viewing the evidence in the light most favorable to the petitioner, the trial court properly found that no reasonable jury could conclude that the behavior of Dr. Nicklin and University City Family Medicine was flagrant, or that it grossly deviated from the ordinary standard of care. To the contrary, the evidence indicated that Dr. Nicklin timely referred the decedent to the hospital, that he timely obtained a psychiatric consult, which included a suicide risk assessment, and that he reasonably relied upon the opinion of the psychiatrist that the decedent was free of suicidal ideation and was a candidate for out-patient counseling. There was no evidence to support petitioner's allegation that the decedent sought and was refused treatment from Dr. Nicklin and/or University City Family Medicine between June 12, 1993 to July 4, 1993 or that Dr. Nicklin and/or University City Family Medicine

was ever informed of a change in the decedent's mental status following her discharge. Since the case was entirely free from doubt, the trial court did not err in granting respondents' Motion for Summary Judgment.

After the April 26, 2002 hearing on respondents' Motions for Summary Judgment, and immediately prior to the June 11, 2002 repeat hearing necessitated by the malfunctioning court reporting machine, petitioner, for the first time, produced an unsigned preliminary report authored by Dr. Bursztjan. (SRR.2-9) In his report, Dr. Bursztjan, expresses the opinion that Dr. Nicklin, a family practitioner, breached the standards of "psychiatric care" and that his treatment decisions were "likely" influenced by the health maintenance organization. (SRR.5, 9)

The trial court properly found that the unsigned, preliminary report of Dr. Bursztjan was untimely and insufficient as a matter of law to create a genuine issue of material fact. Pennsylvania Rule of Civil Procedure No. 4003.5., which governs the discovery of expert testimony, mandates that an expert report be signed by the expert. The report of Dr. Bursztjan was not only not signed, but was not even a final report, having been qualified as "preliminary." (SRR.9) Since Dr. Bursztjan's report was not signed and the opinions expressed therein were preliminary and subject to change, the trial court properly found that Dr. Bursztjan's opinion was not expressed within a reasonable degree of medical certainty.

B. Petitioner failed to articulate genuine issues of material fact with respect to the issue of whether Dr. Nicklin and University City Family Medicine's care and treatment of the decedent was influenced by financial incentives allegedly provided by her health maintenance organization.

The admission of expert testimony is within the discretion of the trial court. *Duquesne Light v. Woodland Hills School Dist.*, 700 A. 2d 1038, 1047 (Pa. Commw. 1997). In order for expert testimony to be admissible, the party seeking to offer that testimony must provide an adequate foundation for doing so. *Commonwealth v. Khamphouseane*, 434 Pa. Super. 93, 642 A.2d 490, appeal denied, 538 Pa. 666, 649 A.3d 669 (1994). A party does not lay an adequate foundation for expert testimony simply by presenting the testimony of its witnesses that he or she believes a particular proposition to be true based upon his or her own personal views and observations. *Commonwealth v. Appollo*, 412 Pa. Super. 453, 603 A.2d 1023, appeal denied, 531 Pa. 650, 613 A.2d 556 (1992). Stated another way, expert testimony is incompetent and may not be admitted into evidence if the expert's opinion is based upon mere conjecture. *Collins v. Hand*, 431 Pa. 378, 346 A.2d 398, 404 (1968). It is an abuse of discretion to admit an expert's opinion if it lacks an adequate factual basis. *Hussey v. May Department Stores, Inc.*, 238 Pa. Super. 431, 357 A.2d 635 (1976).

In support of his allegations regarding the alleged influence and control of U.S. Healthcare, petitioner produced an expert report authored by David L. Rhodes, M.D., an anesthesiologist. (R.957) Petitioner later attempted to substitute Dr. Bursztjan for Dr. Rhodes. The

trial court properly found that petitioner, regardless of which expert testified at trial, had failed to articulate genuine issues of material fact with respect to petitioner's allegation that HMO-related financial incentives influenced the medical care rendered to the decedent by Dr. Nicklin and University City Family Medicine.

Petitioner's expert, Dr. Rhodes, in a report dated December 3, 1997, offered the following opinions with respect to the alleged influence of HMO-related incentives:

> Since Dr. Nicklin's June 11, 1993 personal handwritten note in Pennsylvania Hospital's records quite candidly documents that Mrs. Lazorko's "major psych problems" were "well known" to him; that he knew she was "very depressed" and "wished to die," and further acknowledged that her current suicide attempt by overdose was not to be taken lightly – representing "quite significant risk of death," his medical training should have provided him with the knowledge that such a chronic and severe condition could not miraculously change overnight and that his discharge of Mrs. Lazorko the very next day, June 12, 1993, was grossly inappropriate.
>
> As much as it displeases me, *in light of Dr. Nicklin's handwritten note, I am ethically bound to conclude that his decision to discharge her in less than seventy-two hours when it was well known to him that she was chronically depressed and a suicide risk, must have been made by him because of either monetary restraints placed on his treatment regime by Pennsylvania Hospital and/or U.S. Healthcare/HMO PA-NJ and/or financial incentives offered to him for managing his practice in that manner.* (R.957)

Dr. Rhodes provides absolutely no support for his opinion that HMO-related financial incentives influenced the medical care provided by Dr. Nicklin and University City Family Medicine. Dr. Rhodes simply states, in conclusory fashion, that the decision to discharge the decedent must have been made by Dr. Nicklin because of "either monetary restraints placed on his treatment regime by Pennsylvania Hospital and/or U.S. Healthcare/HMO PA-NJ and/or financial incentives offered to him for managing his practice in that manner." (R.957) Because Dr. Rhodes' opinion is not grounded in fact, it amounts to nothing but pure speculation and does not constitute proper evidence.

Petitioner's expert, Dr. Bursztjan, in a report dated June 5, 2002, offers the following opinions with respect to the alleged influence of HMO-related incentives on the care rendered to the decedent by respondents:

> . . . Although the medical and insurance records are substantially incomplete there is substantial data to support the opinion that economic factors, including the influence and control exercised by a health maintenance organization (HMO), substantially influenced and controlled clinical decision making, the psychiatric care this patient and her family received, and the departures from the standard of psychiatric care. Therefore these are among the foreseeable medical causes of her eventual death by partially treated psychoses driven suicide. But for these medical causes her death by psychoses driven suicide was preventable. Specifically
>
> * * *
>
> I. There was a failure to educate and inform Mrs. Norlie-Lazorka's and her husband of

. . . the role of economic considerations in Mrs. Norlie Lazorko's premature hospital discharge.

J. . . . there is substantial data to support the opinion that economic factors, including the influence and control exercised by a health maintenance organization (HMO), substantially influenced and controlled clinical decision making, the psychiatric care this patient and her family received, and the departures from the standard of psychiatric care. This includes Dr. Lang's note of 7/31/92 stating "will recommend that HMO find inpatient facility for patient". (page 2 emergency evaluation), US Mental Health Systems Communication Log, Medical Admissions Notification Forms, Hospitalization Review Forms, Discharge Forms indicating substantial communication with the HMO, and oversight and control by the HMO of the patient's clinical status and care, and admission and discharge planning. Moreover the contractual arrangements between the HMO and the patient's primary care physician were of a capitation nature and likely to create the risk of conflict of interest between the primary care clinician and this patient.

K. The lack of care this patient and her family received is consistent with economic factors unduly influencing her care including US Behavioral oversight and control of her care, and the potential conflict of interest created by the HMO capitation scheme for the primary care physician.

L. The failure by the HMO or the treating clinicians to inform the patient and her family of the nature and extent of oversight, control and influence exercised by the HMO on her care, and the potential capitation scheme financial conflicts of

> interest limiting her care are in violation of the relevant AMA Code of Ethics sections, departures from the standard of care, . . . (SRR.8-10)

The medical records and other documents cited by Dr. Bursztjan in his expert report do not support his opinion that alleged HMO-related incentives influenced Dr. Nicklin and/or University City Family Medicine's care of the decedent.

Dr. Bursztjan cites to a note written by "Dr. Lang" in July 31, 1992 stating "will recommend that HMO find inpatient facility for patient." The care rendered to the decedent in 1992 is not relevant to this dispute. Furthermore, Dr. Lang is not an associate of Dr. Nicklin and/or University City Family Medicine and the note documenting his alleged plan is not contained within the office records of Dr. Nicklin or the records of Pennsylvania Hospital pertaining to the decedent's June 10, 1993 admission.

Dr. Bursztjan also cites to the U.S. Mental Health Systems Communication Log and Medical Admissions Notification Forms as evidence of HMO control and influence. The only documentation contained in the log pertaining to the June 1993 admission of the decedent to Pennsylvania Hospital is a one page document entitled "USMHS – Medical Admission Notification Form" which indicates only the facts of her admission and discharge plan. (R.1790) Dr. Bursztjan also cites to "Hospitalization Review Forms" and "Discharge Forms" indicating substantial communication with U.S. Healthcare and oversight and control by the HMO of the patient's admission clinical status and care, and admission and discharge planning. Dr. Nicklin and University City Family Medicine are aware only of a USHC Claims Report pertaining to the

decedent which contains only one entry pertaining to the June 10, 1993 admission. This entry simply documents a service date of June 10, 1993 (the decedent's emergency room visit) and indicates the amounts charged and paid by U.S. Healthcare to the provider. (R.1784) The U.S. Healthcare "Admissions for Member" form contains entries dated June 11, 1993 which appear to indicate that a representative of U.S. Healthcare spoke to Social Services, giving the telephone number for certain mental health interventions. (R.1450) The entries further set forth certain facts pertaining to the hospitalization. (R.1450) Finally, the Discharge Summary does not contain any information whatsoever concerning the decedent's health insurance. (R.1500) There is absolutely no evidence which even suggests that alleged HMO financial incentives influenced, in any way, the care rendered to the decedent by respondents.

Finally, Dr. Bursztjan does not state to a reasonable degree of medical certainty that the contractual arrangements between the HMO and Dr. Nicklin created a conflict of interest between himself and the decedent, resulting in the negligent delivery of health care services. Rather, Dr. Bursztjan states only that the contractual arrangements between the HMO and Dr. Nicklin were "likely" to create the risk of conflict of interest between Dr. Nicklin and the decedent. (SRR.9) Dr. Bursztjan does not identify what financial incentives allegedly motivated respondents to discharge the decedent, making only a vague reference to the "capitation nature" of the insurance plan. (SRR.9) The mere fact that an HMO may provide incentives to physicians to ration the provision of health care cannot support a claim of negligence or willful misconduct in the delivery of healthcare services. (*See Bordlemay v. Keystone Health Plans, Inc.*, 2001 Pa. Super. 381.)

Finally, Dr. Nicklin, at his deposition, testified that U.S. Healthcare did not control, direct or supervise his treatment of the decedent, that he never recommended any treatment which was denied or not approved by U.S. Healthcare, and that he did not consult with U.S. Healthcare on any of the treatment he provided to the decedent. (R.861) Dr. Nicklin also testified that there were no procedures or restrictions that he received from U.S. Healthcare that prevented him from rendering any treatments to the decedent or from ordering any treatments for her that he thought were necessary. (R.861) Finally, Dr. Nicklin testified that there was never a time that he did not provide treatment to the decedent because of the manner in which he was being reimbursed by U.S. Healthcare and that the treatment he provided to patients with U.S. Healthcare coverage did not differ in any way from the treatment he provided to "fee-for-services" patients. (R.862) Petitioner failed to produce any competent evidence to contradict Dr. Nicklin's testimony.

C. Even if this Court were to find that the reports of petitioner's experts, Dr. Rhodes and Dr. Bursztjan, were sufficient to create genuine issues of material fact with respect to the alleged negligence of Dr. Nicklin and University City Family Medicine, these respondents would still be entitled to prevail on their Motion for Summary Judgment since petitioner's experts were not qualified to express an opinion on the issue of Dr. Nicklin's alleged negligence.

The admission of expert testimony is within the discretion of the trial court. *Duquesne Light v. Woodland Hills School Dist.*, 700 A.2d 1038, 1047 (Pa. Commw.

1997). It has long been the law in Pennsylvania that the test to be applied when qualifying a witness to testify as an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine. *Miller v. Brass Rail Tavern, Inc.*, 541 Pa. 474, 664 A.2d 525, 528 (1995).

Section 512 of Pennsylvania's Medical Care Availability and Reduction of Error (MCARE Act), provides, in pertinent part, as follows:

> (a) General rule. – No person shall be competent to offer an expert medical opinion in a medical professional liability action against a physician unless that person possesses sufficient education, training, knowledge and experience to provide credible, competent testimony and fulfills the additional qualifications set forth in this section as applicable.
>
> (b) Medical testimony. – An expert testifying on a medical matter, including the standard of care, risks and alternatives, causation and the nature and extent of the injury, must meet the following qualifications:
>
> (1) Possess an unrestricted physician's license to practice medicine in any state or the District of Columbia.
>
> (2) Be engaged in, or retired within the previous five years from, active clinical practice or teaching . . .
>
> (c) *Standard of care. – In addition to the requirements set forth in subsections (a) and (b), an*

expert testifying as to a physician's standard of care also must meet the following qualifications:

(1) *Be substantially familiar with the applicable standard of care for the specific care at issue as of the time of the alleged breach of the standard of care.*

(2) *Practice in the same subspecialty as the defendant physician or in a subspecialty which has a substantially similar standard of care for the specific care at issue, except as provided in subsection (d) or (e).*

(3) *In the event the defendant physician is certified by an approved board, be board certified by the same or a similar approved board, except as provided in subsection (e).*

* * *

(e) Otherwise adequate training, experience and knowledge. – A court may waive the same specialty and board certification requirements for an expert testifying as to a standard of care if the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in or full-time teaching of medicine in the applicable subspecialty or a related field of medicine within the previous five-year time period. (A copy of Section 512 is attached hereto as Exhibit "A.")

Neither of petitioner's experts, Dr. Rhodes, an anesthesiologist, or Dr. Bursztjan, a psychiatrist, are qualified to render an opinion as to the standard of care owed by Dr. Nicklin, a family practitioner. Neither expert is board certified by the same or a similar approved board as Dr. Nicklin and neither practices in the same subspecialty as

Dr. Nicklin or in a subspecialty which has a substantially similar standard of care for the specific care at issue. Thus, both experts are precluded from offering an opinion at trial concerning their alleged breach of the standard of care.

II. Petitioner's newly disclosed expert, Harold J. Bursztjan, M.D., cannot fairly be considered to be a substitute for his former expert, David L. Rhodes, Sr., M.D.

Under Pennsylvania law, a substitute expert "stands in the shoes" of an expert who, for whatever reason, usually death or documented health problems, is unavailable to attend trial. Stated otherwise, a substitute expert's opinions should be consistent with, and not go beyond the scope of, the original expert's report. In addition, the operative facts relied upon by both experts to support their opinions should be substantially the same. Finally, a party cannot switch experts before trial without offering a compelling justification. *See Baselice v. Hasbrouck*, CCP. Phila., Feb. Term, 1995, No. 2557 (September 29, 1998), aff'd, Pa. Super. (December 22, 1999); *see also Beyer v. Epstein*, 33 Phila. 54 (1997).

Dr. Bursztjan cannot fairly be considered to be a substitute expert for Dr. Rhodes. First, Dr. Rhodes is an anesthesiologist while Dr. Bursztjan is a forensic psychiatrist. (R.187) Second, the theories of liability set forth in Dr. Bursztjan's expert report far exceed those set forth in the expert report of Dr. Rhodes. At the "repeat" argument, petitioner's counsel admitted that Dr. Bursztjan's report went beyond the scope of Dr. Rhodes' report. (R.3329-3330) Finally, the records on which the two experts relied to form their opinions differs dramatically. (R.957, SRR.3-5)

Because Dr. Bursztjan and Dr. Rhodes differ in their areas of expertise and the scope of their opinions, and because the operative facts relied upon by both experts to support their opinions are not substantially the same, Dr. Bursztjan cannot fairly be considered to be a "substitute" expert for Dr. Rhodes.

Furthermore, petitioner failed to offer a compelling justification for switching experts at "the eleventh hour." The only excuse petitioner offered for the sudden unavailability of Dr. Rhodes was that Dr. Rhodes had "moved out" and was no longer available to "testify in this capacity." (R.3328) At the hearing, petitioner did not produce an affidavit of Dr. Rhodes or any other evidence supporting his claim that Dr. Rhodes was no longer. Because petitioner failed to offer a compelling justification for switching experts at this late date, the trial court need not have even considered Dr. Bursztjan's report in ruling on the Motions for Summary Judgment.

III. The trial court did not err by implicitly finding that petitioner's contention that Dr. Nicklin destroyed evidence during the pendency of this litigation was without merit.

Spoliation is the intentional or negligent destruction of evidence. In *Schroeder v. Department of Transportation*, 551 Pa. 243, 710 A.2d 23 (Pa. 1998), our Supreme Court adopted the spoliation-of-evidence standards set forth by the Third Circuit Court of Appeals in *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76 (3d Cir. 1994). According to the Court in *Schmid*, the spoliation doctrine is broadly applicable to cases where "relevant evidence" has been lost or destroyed.

Throughout this litigation, petitioner has repeatedly accused Dr. Nicklin and University City Family Medicine of discarding documents relevant to his claim during the pendency of this litigation. Specifically petitioner has accused Dr. Nicklin of destroying his U.S. Healthcare file, including capitation lists, utilization reports, yearly evaluations and his contract with U.S. Healthcare, after he had been sued and after he had been served with discovery requesting these documents. During his deposition, Dr. Nicklin testified that he did not maintain a U.S. Healthcare file. (R.843-844) Further, Dr. Nicklin testified that he did not keep capitation lists and utilization reports after they became "years old" because they had no relevance to his practice. (R.844) Dr. Nicklin testified at deposition that he did not keep copies of the yearly performance evaluations he received from U.S. Healthcare but discarded them after reviewing them. (R.844) Finally, Dr. Nicklin testified that he kept his U.S. Healthcare contract for a period of time but hadn't had it for years.

Assuming arguendo, that petitioner could prove that Dr. Nicklin discarded relevant documents during the pendency of this litigation, he could not prove that he had been harmed. U.S. Healthcare produced a copy of its contract with Dr. Nicklin, (R.2297), its Claims Report pertaining to the decedent, along with the providers' charges and the amounts paid, (R.1783), its Member Admissions Report, (R.1786-1788), and its Mental Health Systems Records pertaining to the decedent. (R.1789-1812) Further, petitioner, himself, produced a copy of a U.S. Healthcare Primary Care Physician Agreement Execution, which includes a section on physician compensation. (R.455-465) Petitioner also produced a copy of a U.S. Healthcare Quality Care Compensation System Monthly

Sample Reporting Package which discusses capitation, physician compensation and utilization reports. (R.467-492) Accordingly, even if petitioner could prove that Dr. Nicklin destroyed documents relevant to this litigation during the course of the litigation, he could not have proven that he suffered any prejudice from Dr. Nicklin's alleged conduct since the documents have already been produced or are in the possession of U.S. Healthcare.

CONCLUSION

For the reasons set forth above, respondents, David E. Nicklin, M.D., and University City Family Medicine, respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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